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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 685

LESLIE L. CONNER, *Petitioner,*

v.

A. J. SIMLER, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals, Tenth Circuit, entered in this cause on September 3, 1960.

OPINION BELOW

The District Court entered a Summary Judgment in favor of the Petitioner which appears in the original record certified to this Court and in Appendix A. The opinion of the Court of Appeals, Tenth Circuit, reported at 282 F. 2d 382, appears in Appendix B.

JURISDICTION

The judgment of the Court of Appeals, Tenth Circuit, was entered on September 3, 1960. Rehearing was denied on September 27, 1960. (Appendix C.) On December 19, 1960, by order of Mr. Justice Whittaker, the time within which to file a petition for a writ of certiorari was extended to January 30, 1961. The jurisdiction of this Court is invoked under Title 28 U.S.C. Section 1254(1).

STATUTES INVOLVED

Rule 56(c), Fed. Rules Civ. Proc., 28 U.S.C.

> "(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages."

28 U.S.C. § 2201

> "§ 2201. Creation of remedy
>
> "In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such."

28 U.S.C. § 1291

"§ 1291. Final decisions of district courts.

"The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court."

QUESTIONS PRESENTED

1. When the District Court explicitly found that no issue of fact existed and no evidence of fraud was presented, whether a Court of Appeals can set aside a summary judgment for Petitioner and order a jury trial on the issue of fraud, without determining that an issue of fact was present?

2. Whether a Court of Appeals can set aside a summary judgment for Petitioner which is rested upon two independent, self-sufficient grounds, without finding that neither ground is sufficient in law to support the judgment?

3. Where the District Court has found there is no issue of fact, and that "there is no evidence of fraud" whether a Court of Appeals may, without rendering Rule 56 of the Federal Rules of Civil Procedure meaningless, reverse a summary judgment and require a jury trial as to the existence of fraud, basing its reversal on a state rule of substantive law as to fraud? and whether such action is not an invasion of the discretionary function of the District Court under Rule 56?

4. Whether a Court of Appeals can set aside a summary judgment of a District Court rendered in ac-

cordance with Rule 56 of the Federal Rules of Civil Procedure, a decision on procedure in a federal court, and on grounds purely and solely derived from local (state) law, order a jury trial?

5. Whether a Court of Appeals can require a District Court by a writ of mandamus to submit to a jury an issue of fact, without determining that such an issue exists? Whether this violates the trial court's duty and right to determine whether an issue, in fact, exists?

STATEMENT

Birdine Fletcher, whose sole and only heir was A. J. Simler, the respondent, chose to leave him in her will "the sum of $1.00." She died in July, 1952. On July 18, 1952, Simler engaged the Petitioner, Leslie L. Conner, a member of the Oklahoma bar, to represent him in contesting the will. The following letter addressed to Conner and signed by Simler embodied the agreement: (R. 66)

July 18, 1952.

Mr. Leslie L. Conner, Atty.,
410-414 Hightower Bldg.,
Oklahoma City, Oklahoma.

Dear Sir:—

Re: BIRDINE FLETCHER ESTATE
COUNTY COURT OKLAHOMA COUNTY,
OKLAHOMA.

This confirms our employment of your self and law firm to represent us in the matter of the Estate of Birdine Fletcher, deceased, now pending in the County Court of Oklahoma County, Oklahoma wherein certain people have filed petition to probate an alleged will supposed to be signed by her.

We agree to pay all the witness fees, court costs, furnish all bonds, purchase copy of all records from court reporters, prepare the evidence and pay all necessary bills to contest the admission of this will to probate because we do not believe it is a valid will. We understand that this will run in the approximate neighborhood of $1,000.00.

We also agree to pay you and your firm a reasonable attorneys fee for the services rendered and to be rendered in this case in the County Court, and if necessary in the District Court and if necessary in the Supreme Court of the State of Oklahoma, which fee may be set by the County Court or any other court; if the matter is successful either by trial or judgment or compromise.

If the matter is not, won, compromised or settled you are not to charge us a fee.

Yours truly,

/s/ A. J. SIMLER
A. J. Simler, for himself and his children.

Two months later, Conner held a conference with Simler at his office to discuss the proposed Federal litigation, attacking the validity of the residuary bequest in the Fletcher will. Another attorney, Arnold Britton, was present. Conner proposed to employ two other Oklahoma City attorneys to assist him in the proposed Federal litigation, all of which was explained to Mr. Simler. In order to employ them it was necessary that Conner assign them a part of his contingent fee-contract of July 18, 1952. Having agreed on a reasonable graduated scale of contingent fees, the parties reduced it to writing; not as a new employment contract, but merely clarification of the original July 18,

1952, contingent-fee contract.[1] The letter was signed by Simler. The letter itself is the clearest exposition of its terms. (R. 68)

September 25, 1952.

Mr. Leslie L. Conner
Conner, Hilpirt & Britton
Attorneys and Counselors at Law
410-414 Hightower Building
Oklahoma City, Oklahoma.

Dear Sir:—

With reference to my letter of July 18, 1952, employing your firm in the Fletcher Will and Estate Contest, I agree that the reasonable fee is:

25% of the amount recovered if settled without trial.

33⅓% of the amount recovered if the case is tried in County and District Court.

50% of the amount recovered if the case is appealed to the Supreme Court.

I understand that all expenses, taxes, and costs are to be deducted first.

This is a contingent fee and if nothing is recovered, no fee is to be paid.

If anything is recovered or settled, I agree to pay you the above fees.

Yours truly,

/s/ A. J. SIMLER
A. J. Simler.

[1] Section 7, Oklahoma Statutes, provides that attorneys may contract for contingent fees "not to exceed fifty per centum."

The litigation began on October 2, 1952, in the County Court. On October 14, 1952, on Simler's written authorization (R. 69), the federal action was initiated to challenge the validity of the devise of an oil producing farm to a foreign corporation. It continued through nineteen separate cases, proceedings and appeals until May, 1957. (See R. 556, et seq.)

The Court of Appeals in *Simler* v. *Wilson* (C.A. 10), 210 F. 2d 99 (1953), ruled in Simler's favor that the foreign corporation was ineligible under Oklahoma law to take the Caddo County Oil farm and that as to it Birdine Fletcher died intestate. This Court denied certiorari, *Wilson* v. *Simler*, 347 U.S. 954. On November 30, 1954, the Oklahoma County Court entered a final decree awarding the farm and all income therefrom to Simler from the date of his sister's death.

Thereafter, Conner litigated an appeal on behalf of Simler from the portion of the decree which ordered the costs, taxes, legacies, and expenses of litigation paid from farm proceeds. This resulted in preventing $73,000 in legacies from being paid from Simler's inheritance. *Simler* v. *Wilson* (Okla.) 308 P. 2d 304.

Until Simler took possession of the Caddo farm in December, 1954, he never questioned the terms under which he had engaged the services of the Petitioner. Then, with possession of the farm achieved for him by Conner's efforts, he first exhibited signs of repudiating the agreement.

The Present Litigation

In April, 1958, Simler, the respondent, filed a suit for a declaratory judgment of whether Conner was entitled

to a fifty per cent fee as promised in the letter of September 25, 1952, or a fixed cash fee. The suit was brought in the United States District Court for the Western District of Oklahoma on the ground of diversity of citizenship, petitioner being a citizen of Oklahoma and Simler a citizen of Arkansas.

On November 23, 1959, Conner moved for summary judgment. During the course of several hearings of the motion, Simler sought to compel a jury trial by means of mandamus from the Tenth Circuit Court of Appeals. Mandamus issued on January 7, 1960, directing the District Judge to submit all disputed issues to a jury, but the order provided that it was "*not to be construed*" to prevent the trial judge from granting summary judgment if he "*determines such disposition to be required or proper in law.*" (R. 957)

On January 12, 1960, summary judgment for Petitioner was granted (App. A). Judge Chandler stated his reasons in part as follows:

> That there is no issue of fact concerning the circumstances under which the letter of September 25, 1952 came into existence in which the parties themselves fixed the percentage of recovery to be realized by defendant as his contingent attorney fee provided in the letter of July 18, 1952; and there is no evidence of fraud, overreaching or misconduct on the part of the defendant which would form any basis to set aside or disregard the letter as a part of the contract between the parties.
>
> That under the terms of the letter of July 18, 1952, properly construed and interpreted, even if the parties had not thereafter agreed upon the percentages, the contingent fee was to be set by the Court without a jury and the Court finds from the undisputed facts as to the services rendered that

a reasonable contingent fee for the services of the defendant in this cause is 50% of the real and personal property recovered after payment of the expense of the litigation.

. . .; that defendant performed legal services for and was attorney for plaintiff in some 19 separate cases in the State Courts and Supreme Court of Oklahoma, the Federal Courts, the Court of Appeals and the Supreme Court of the United States; that defendant has fully performed his contract and plaintiff has accepted the benefit of defendant's services all with full knowledge that he was proceeding under said contingent fee contract composed of both of the aforesaid letters.

Judge Chandler further decreed that petitioner owned one-half of the Caddo farm and was entitled to one-half of the accumulated income therefrom, after payment of various expenses out of it.

Respondent appealed to the Tenth Circuit Court of Appeals and the trial court was reversed on September 3, 1960. Rehearing was denied on September 24, 1960. *Simler* v. *Conner*, 282 F. 2d 382 (App. B).

The Court of Appeals (Pickett, J.) based its reversal on these grounds:

1. Under Oklahoma law, contracts between attorney and client are presumed fraudulent, and the attorney has the burden to establish the absence of fraud, citing the Oklahoma decision of *Haunstein v. McCalister*, 46 P. 2d 552.

2. The letter of September 25 was an adjustment of the original contract and subject to the rule pronounced.

3. The question of the presence of fraud should have been submitted to a jury.

The Tenth Circuit opinion cited Oklahoma cases for its first point, *but no cases for either of the other two points.* It did not state that the findings of the trial judge that there was no issue of fact and that no evidence of fraud existed were erroneous. It did not even discuss the findings or decision of the trial judge beyond the bare notation that he had granted summary judgment for petitioner.

The Unchallenged Basis of the Summary Judgment

Judge Chandler, as petitioner has already mentioned, held several hearings on the motion for summary judgment. It was his conclusion after respondent had had ample opportunity to demonstrate otherwise, that

1. There was no issue of fact.

2. There was no evidence of fraud.

3. If, *for any reason,* the September letter was inoperative, then Petitioner was entitled to a fifty per cent fee anyway, under the terms of the July letter contract.

These findings and conclusions were based upon the plain language of the letters quoted in full above at pages 4 and 6. In addition, the judge had before him the depositions of both parties and of Arnold Britton, the other person present when the September 25th letter was signed. These appear at R. 707, R. 857, and R. 955. Pertinent excerpts are set out below:

1. From Mr. Conner's:

> A. I can't answer your question except that that is our contingent fee contract. All this letter of

September 25th, 1952, does to the letter of July 18, 1952, is for him and I to determine what the word reasonable fee meant, and it inured just as much to his benefit as it did to mine. Now, another thing, another thing, Mr. Ogden, that might have brought this thing about, I had discussed this matter as I recall, with Mr. Grigsby, about employing him on a contingent fee contract in this case, and he said, 'How have you been employed?' And I showed him my July 18th employment, and I think that either he or Mr. Britton was talking about that we had better find out from Mr. Simler or agree with Mr. Simler what a reasonable fee would be, and that may be another thing that brought this thing about." (R. 711 et seq.)

2. From Mr. Simler's:

The Witness: I signed it for one reason because they talked in such a manner that it would just be impossible for them to continue the case unless they got a stronger, more assured contract than they had before, that it was a reasonable contract and they didn't think that that was, in other words, sufficient for all the litigation they were going to have and at the same time they assured me that they had the will case by hiring Mr. Daugherty, that they had the will case finally froze up. Now, I don't say that they hired Mr. Daugherty at this time, but they did right shortly after that and he informed me that he was going to hire some other lawyers, but he didn't tell me who they were, but he said he had a good will case man. (R. 860)

3. From Mr. Britton's:

Q. All right, sir. Now when you called Mr. Simler down on the 25th of September, 1952, was Mr. Grigsby there?

A. I don't remember.

Q. Well, when this letter was signed, you don't know who was there then?

A. Well, I am sure that I was there, and I am sure that Mr. Conner was there, but I don't remember for sure whether or not Mr. Grigsby was there.

Q. Would you tell the court and jury why you said to Mr. Conner and Mr. Conner to you—Would you tell the court and jury what you said to Mr. Conner and Mr. Conner to you, and either one of you to Mr. Simler about this letter here dated the 25th of September, 1952, signed by Mr. Simler?

A. What was said to Mr. Simler?

Q. Yes.

A. Well, I think I have answered it once, but I will try to do it again.

Q. Well, I do not recall it, if you did.

A. That we just felt like because of the mass litigation that was going on and for the protection of everyone concerned, both Mr. Simler and to Mr. Grigsby, Mr. Conner and myself, that the amount of the fee ought to be set out with particularity so that we would know where we were and that that was more or less a standard amount and we thought that it was a fair and reasonable fee, and I can't say to you that Mr. Simler was gleeful or enthusiastic about it, but the fact remains that he did sign it. (R. 955-1)

In addition, Judge Chandler held a pre-trial conference and several hearings on the Motion for Summary Judgment, the records of which were transcribed and appear at R. 595, 994, 1030 and 1053. At one of these hearings (R. 595 at Pages 60-65) Judge Chandler made the same request of respondent's counsel that Judge Wallace had previously made, "Who are your witnesses and what evidence will you produce to prove your allegations of fraud?"

The Court: What additional testimony? I don't want to know what it is, but on what point would you offer additional testimony?

Mr. Ogden: Well, if your Honor please, of course, we would naturally offer evidence to show what a reasonable fee was in a case of this kind.

The Court: Of course.

Mr. Ogden: That is one thing we would naturally do, because we think that would be proper. And then next, if your Honor please, Mr. Simler has testified he doesn't desire to change his testimony, but we do desire to corroborate it with other testimony which we think we have at the time.

The Court: How could there be any other testimony on that point?

Mr. Ogden: Well, Mr. Conner and Mr. Simler are in complete disagreement in this on what took place.

The Court: There are only the two of them who were there.

Mr. Ogden: Well, if your Honor please, I'm not saying—well, there was other people there, though, Judge.

The Court: Whose testimony are you going to rely on to add to it?

Mr. Ogden: Well, I think I'm going to rely on Mr. Arnold Britton. Mr. Arnold Britton sued Mr. Simler for attorney's fee.

The Court: You are going to use Mr. Britton now? What are you going to prove by him?

Mr. Ogden: Judge, I've got his deposition and as I recall it, he testifies in that deposition, I don't attempt to remember it in detail, but as I recall it, he testifies that it was after this county court case which was October the 2d, that Mr. Grigsby got up the idea to file this case in the Federal Court, that Mr. Conner had nothing to do with it, hadn't even thought about it, knew nothing about it; that Mr. Grigsby filed it and Mr. Grigsby went to Denver and argued it at the Bar.

Compare what Ogden said Britton would say with what Britton actually testified to as set out supra. There was no issue of fact. There was not even the suggestion of fraud.

REASONS FOR GRANTING THE WRIT

The decision of the Tenth Circuit Court of Appeals in this case cannot be left undisturbed and it is imperative that this Court correct the errors involved, for several reasons, any one of which qualifies for review by this Court, but which, taken together show a compelling need for this Court's attention. The Tenth Circuit is in a state of confusion as to its relation as an appellate tribunal to the trial courts subject to its supervision.

In this case, the Tenth Circuit overturned a summary judgment for petitioner and committed these errors in the process:

1. It failed to apply correctly Rule 56 F.R. Civ. P., by ignoring the trial judge's express finding that there was *no issue of fact*, and moreover *no evidence of fraud*.

2. It ignored the second ground of the summary judgment entirely—that even if the September contract was ineffective—that petitioner was entitled to a 50 percent fee, determined by the District Court—in accordance with the original July contract. This was violative of Rule 56.

3. It purported to decide a question of procedure in a Federal Court on the basis of state law only. In fact, it held that Oklahoma law required a jury trial on the question of the existence of fraud, *because* under Oklahoma law, the burden is on the attorney to show the absence of fraud in an attorney-client contract. This was a classic non-sequitur, as well as a gross error in federal procedure.

4. It came into conflict with the Fourth and Ninth Circuits, in the test to be applied to the appellate review of a summary judgment.

5. The joint effect of its mandamus order and its review of the summary judgment was to take from the trial court its right to exercise discretion in granting summary judgment and thus preclude a jury trial. The logical result of this is that a District Court under the Tenth Circuit may not be able to deny a jury trial in any case.[2]

Congress by 28 U.S.C. Section 2072 has empowered the Supreme Court to prescribe by general rules for the District Courts of the United States the form of process, writs, pleadings, and motions and the practice and procedure in civil actions. These rules have the force and effect of a Federal statute, and the Court may not ignore them. *Sibbach* v. *Wilson and Company*, 312 U.S. 5, 13. The whole field of District Court procedure is regulated in the interest of speedy, fair, and exact determination of the truth. This petition raised important questions of the administration of the rules. This Court has granted certiorari in cases where an important question involving the interpretation of the Federal Rules of Civil Procedure has been presented. *La Buy* v. *Howes Leather Co.*, 352 U.S. 249, reh. den. 352 U.S. 1019, *Hickman* v. *Taylor*, 329 U.S. 495.

[2] It is bemusing that the Tenth Circuit in reversing this case found itself violating its own mandamus provision that summary judgment could be granted if the District Judge determined that no factual issue was present.

ARGUMENT

I. The Opinion Is in Direct Conflict With Holdings of the Other Courts of Appeals on This Matter

Where conflict had arisen among the circuits in the interpretation and application of Federal statutes with respect to transfer of civil actions in District Courts, certiorari was granted *Hoffman* v. *Blaski*, 363 U.S. 335, 4 L. ed. 2d 1254.

The Tenth Circuit in this case is in conflict with other Courts of Appeal in the test it requires to be applied by the District Court when entertaining a summary judgment motion. It requires a trial judge when presented with that motion to look first to the state decisions and law to determine whether the case should be submitted to a jury and if a jury trial is proper then the action for summary judgment must be overruled. By the unambiguous terms of Rule 56 this is an erroneous test.

"Rule 56(c) of the Federal Rules of Civil Procedure, 28 U.S.C.A. provides that summary judgment shall be granted if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. That Rule 56(c) applies to declaratory judgment actions is shown by 6 Moore, Federal Practice, ¶ 56.17(19) at 2209 (2d ed. 1953). See also *Farm Bureau Mut. Auto Ins. Co.* v. *Hammer*, 4 Cir., 1949, 177 F. 2d 793; *New Century Cas. Co.* v. *Chase*, D.C. S.D. W. Va. 1941, 39 F. Supp. 768."—*Johnson* v. *Nationwide Mut. Ins. Co.*, 276 F. 2d 574 (C.A. 4) 1960.

It is obvious that the Tenth Circuit conflicts with the Fourth in defining the test to be applied in deciding motions for summary judgment.

The Tenth Circuit in effect says that a judge must grant a jury trial regardless of whether there is a genuine issue of any material fact. The Court of Appeals, Ninth Circuit, in the case of *Gifford* v. *Travelers Protective Association of America*, (C.A. 9, 1946) 153 F. 2d 209 held that the question presented by a motion for summary judgment is whether or not there is a genuine issue of fact and not how that issue should be determined. In the case of *Town of River Junction* v. *Maryland Casualty Company*, (C.A. 5, 1940) 110 F. 2d 273, 283, cert. den. 310 U.S. 634, it was held:

> "That rule contemplates that the District Judge shall take the pleadings as they have been shaped to see what issues of fact they make and then shall consider the 'depositions and admissions on file together with the affidavits' to see if any such issues are real and genuine. If they are not, judgment is given without further trial."

A motion for summary judgment requires the court to determine:

1. Is there a genuine issue of any material fact, and
2. If there is no genuine issue of any material fact, is the moving party entitled to a judgment as a matter of law?

This test is the same whether the case may be triable to a jury or to the court without a jury.

The Tenth Circuit has repudiated this test and in plain language states that if the case is the type of case which should be tried to a jury, by authority of state law, then a motion for summary judgment must be denied. This would require a trial judge to submit all evidence to a jury even though a genuine issue of a material fact does not exist.

II. The Tenth Circuit Failed to Follow Rule 56(c)

The pertinent portion of Rule 56(c) reads:

> "The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

In overturning the judgment for petitioner, the Tenth Circuit ignored this clear language as well as the trial judge's finding in accordance with the Rule that there was no issue of fact in the case. The trial judge went further. He found there was no *evidence* of fraud. Having reached these findings, he concluded as a "matter of law" that petitioner was entitled to judgment.

But the Tenth Circuit in effect ignored Rule 56 in reversing. Instead it discussed the Oklahoma rule that attorney-client contracts made after the relationship has begun are presumptively fraudulent and that it is the attorney's burden to prove that fraud is absent. Conceding that such is a correct statement, how does this affect the summary judgment here?

The trial court after several hearings and after reviewing the depositions before him, and after querying respondent's counsel as to his proposed evidence, found that there was no dispute as to the facts surrounding the contract. Moreover, he found that there was no "fraud, overreaching, or misconduct" by petitioner. There being no dispute as to the facts and no evidence of fraud, Rule 56 compelled the rendering of summary judgment for petitioner.

There were no facts or evidence of fraud on which to ground a fraud finding.

The Oklahoma rule is that the attorney has the "burden" to show the absence of fraud, and petitioner sustained that burden. The trial judge's finding confirmed that the burden was sustained by the pleadings, depositions and affidavits filed in the case. The Tenth Circuit erred when it held, in effect, that the decision as to whether petitioner sustained the burden *had to be made by a jury.* There is no hint in the cases cited by the Tenth Circuit that the fact that the burden of proof is on the attorney in this type of case requires that the case must go to a jury. In fact in two cases cited which involved this "burden," the decisions were rendered by the court. *Roseblоom* v. *Baughman* (Okl.) 37 P. 2d 616 and *Thomas* v. *Wilson,* (Okl.) 185 P. 2d 473.

The question the Tenth Circuit neglected was whether any issue of fact was present in the case. If no factual issue was present, summary judgment was appropriate under Rule 56. *United States* v. *Daubendiek,* (D.C. N.D. Iowa, 1959) 25 F.R.D. 50, 56-57. Petitioner moved for summary judgment and showed that no issue of fact as to the fee to be charged respondent existed. It was then incumbent upon respondent to dislodge this showing by petitioner. *Pen-Ken Gas & Oil Corp.* v. *Warfield Natural Gas Co.,* (C.A. 6) 137 F. 2d 871, 877. He failed to do this because his representation of the facts involved was identical to that of petitioner. "Mere formal denials or general allegations . . . are insufficient to prevent the awarding of a summary judgment." *United States* v. *Daubendiek, supra,* citing numerous decisions.

In certain cases where Federal law is applicable, this Court has set out to affect a uniformity of decision throughout the entire Federal judicial system. This underlying theory of uniformity of decision in cases where Federal law is applicable was stated by this Court in the case of *Sola Electric Company* v. *Jefferson Electric Company*, 317 U.S. 173. This Court held:

> "But the doctrine of that case is inapplicable to those areas of judicial decision within which the policy of the law is so dominated by the sweep of federal statutes that legal relations which they affect must be deemed governed by federal law having its source in those statutes, rather than by local law. *Royal Indem. Co.* v. *United States*, 313 U.S. 289, 296; *Prudence Realization Corp.* v. *Geist*, 316 U.S. 89, 95; *Jackson County* v. *United States*, 308 U.S. 343, 349 350; Cf. *O'Brien* v. *Western U. Teleg. Co.* (CCA 1st) 113 F(2d) 539, 541."

At page 10, (Appendix B) of the opinion of the Court of Appeals that Court said:

> "We are convinced that under the well established principle of law in Oklahoma, the case should have been submitted to a jury on the question of whether the September 25th contract was fair, just and equitable and free from fraud."

In *Ettelson* v. *Metropolitan Life Insurance Company*, (3rd Cir.) (1943) 137 F. 2d 62 cert. den. 320 U.S. 777 the Court said:

> "Well considered Federal decisions have held that the division of function between Court and jury in a Federal Court is to be made by Federal, not State law."

The Tenth Circuit misconstrued the statutory law of Oklahoma and the decisions of the Oklahoma Su-

preme Court. Thus, under *Ettelson*, the Tenth Circuit's holding quoted supra is erroneous on its face. It overlooked the provisions of Rule 56(c) of the Federal Rules governing Summary Judgment and made no reference to the rules or decisions on summary judgments in the Federal Courts.

Even if Oklahoma had such a rule requiring a jury trial, which it does not, it could not be used to interfere with the function of a Federal Judge. In *Herron* v. *Southern Pacific Co.*, 283 U.S. 91, 94, this Court held:

> "state statutes which would interfere with the appropriate performance of [the judge's function] are not binding upon the Federal Court. . . ."

What is said of state statutes in that case is applicable to state court-made law. The discretion of a Federal Judge in granting or denying summary judgment or jury trial in a Federal Court may not be bound by a local rule of burden of proof.

In *Franklin Life Ins.* v. *Talkinghan*, 229 F. 2d 300, a case involving a Texas insurance contract in a suit in Illinois in the U. S. District Court, the court succinctly assigned what law governed each aspect of the case:

> "The evidence shows that the policy in this case was delivered in Texas and its nature, validity and construction must be governed by the law of that state, ... Questions . . . relating to remedies are governed by the law of the forum, which is Illinois . . . . Questions relating to jurisdiction, procedure and practice are governed by Federal law."

Certiorari should be granted to review the question of whether the Court of Appeals erred in reversing to

require a jury trial solely because of state law. Proper administration of the Declaratory Judgment Act and the Rules of Civil Procedure as to summary judgments is involved. In *Miner* v. *Atlass*, 363 U.S. 641, 4 L. ed. 2d 1462, 1463, this Court granted certiorari to settle a conflict between the District Court and the Court of Appeals in applying the Admiralty Rules. See also *Schilling* v. *Rogers*, 4 L. ed. 2d 1478, 1482; 361 U.S. 867. (Certiorari granted because of the "importance of the question in the proper administration of the Trading With the Enemy Act . . . .")

III. The Summary Judgment Rested Also Upon the Undisputed Original Agreement

The Tenth Circuit's opinion does not touch upon the alternate ground of the summary judgment. The trial judge held that even if the September letter was inoperable, the July letter was an adequate basis to award a 50% fee to the petitioner.

The July 18, 1952 letter, set out at p. 4, *supra*, provided for a "reasonable" fee, "which fee may be set by the County Court or any other court." The District Judge found "from the undisputed facts" that "a reasonable contingent fee" was 50%. (App. A) This judgment rests solely upon the original agreement, made as contemplated therein, and is unaffected by any alleged fraud connected with the second letter.

Only indirectly does the Tenth Circuit deal with this question. It recited that it had issued a mandamus order pronouncing respondent's right to a jury trial on the reasonableness of a fee.

The Tenth Circuit, of course, does not share petitioner's view that its mandamus order was an im-

proper attempt to usurp the trial judge's discretion in allowing or denying a jury trial. But, it was clear to the trial judge (1) that the original agreement did not contemplate a jury-set fee; and (2) that there was no issue of fact on the reasonableness of the 50% fee. Seeing that there was nothing to submit to a jury, the trial judge did not choose the "easy but timid way out," mentioned by Justice Frankfurter in his concurring opinion in *Wilkerson* v. *McCarthy*, 336 U.S. 53, 65, that is, to leave all cases to a jury, thus failing the judicial duty to take cases from the jury when the evidence does not warrant, sending them to the jury.

The respondent came into court and asked for a declaratory judgment to establish what was a reasonable fee. The court in this alternate basis of judgment, took him at his word. First, it construed the July letter as agreeing that a court, without jury, could set the fee. It then, finding no issue of fact involved, set the fee at 50%.

IV. Improper Use of Mandamus to Interfere With Trial Judge

The court erred in holding that by the mandamus action it had directed the lower court to grant Simler a jury trial and so interpreted its own judgment entered in the mandamus action. The mandamus action was improper and the Court of Appeals could not control the discretionary powers of the District Court by mandamus. Title 28 U.S.C.A. § 1291.

In *Roche* v. *Evaporated Milk Assoc.*, 319 U.S. 21. this Court held:

> "As the jurisdiction of the circuit court of appeals is exclusively appellate, its authority to issue writs of mandamus is restricted by statute

to those cases in which the writ is in aid of that jurisdiction." (Id. at 25)

". . . while a function of mandamus in aid of appellate jurisdiction is to remove obstacles to appeal, it may not appropriately be used merely as a substitute for the appeal procedure prescribed by the statute." (Id. at 26)

In this case, the Court of Appeals improvidently granted the writ of mandamus and compounded its improvidence by using the writ as a foundation for its subsequent opinion.

The respondent, after obtaining a transfer of the case from Judge W. R. Wallace's docket to Chief Judge Stephen S. Chandler, filed in the Court of Appeals, Tenth Circuit, a petition for a writ of mandamus seeking to compel Judge Chandler to grant him a jury trial. On January 7, 1960, the Court of Appeals considering the petition as an application for an order to file a petition issued the following order directed to Judge Chandler:

"Treating the petition for a writ of mandamus as an application for leave to file a petition for mandamus, it is now here ordered that said application for leave to file be and the same is hereby granted, and upon consideration of the petition for a writ of mandamus and the files and records in support thereof, it is hereby ordered:

1. That the Honorable Stephen S. Chandler, Chief Judge of the United States District Court for the Western District of Oklahoma, is hereby directed and ordered to vacate all orders heretofore entered by the United States District Court for the Western District of Oklahoma denying a jury trial to the plaintiff in that certain action entitled A. J. Simler, plaintiff, v. Leslie L. Conner,

defendant Civil No. 8008, and submit to a jury for determination all disputed issues of fact, arising in such action.

2. *That this order is not to be construed as to have any application to the duty and right of the court to determine what, if any, disputed issues of fact exist in said action, or to the right of the court to dispose of the action summarily if the court, in the exercise of its sound judicial judgment, determines such disposition to be required or proper in law.*" (Emphasis added) (R. 957)

In compliance with the first part of the mandamus order Judge Chandler vacated all orders denying Simler a jury trial. Then, assuming that the second paragraph of that order meant what it said, Judge Chandler, in the proper exercise of his judicial discretion, examined all the testimony included in the depositions of the parties on file, their pleadings and admissions, and determined there was no genuine issue of any material fact in the action, and, acting under the applicable provisions of Rule 56(*c*) of the Federal Rules, entered a judgment for petitioner.

When this judgment was appealed by Simler to the Tenth Circuit, that Court stated in its opinion reversing Judge Chandler that it had ordered Judge Chandler to grant Simler a jury trial. We quote from that opinion. (Appendix B):

> "We held in the mandamus action that Simler was entitled to a jury trial on the question of the reasonableness of a fee."

There was no such holding in the mandamus order, and if there were, the Court of Appeals was clearly without authority to order Judge Chandler to submit that question to a jury. We call attention to the

following language of that Court's opinion (Appendix B):

> "Thereupon Simler brought mandamus proceedings in this court in which he sought an order directing the District Court to submit the issue to a jury. On January 7th, 1960, an order was entered directing the District Judge to vacate all orders theretofore entered denying the jury trial to the plaintiff and to submit for determination all disputed issues of fact arising in said action. *Defendant's motion for summary judgment was pending and the order provided that it was not to be construed to affect the right of the District Court to dispose of the action summarily.*" (Emphasis added)

On one hand the Court of Appeals says that Simler was entitled to a jury trial on all disputed issues of fact and in the same paragraph of the opinion says that the trial judge could dispose of the matter summarily. But when Judge Chandler did enter a judgment summarily the Court of Appeals reversed him and directed a jury trial.

Such a holding by the Court of Appeals destroys the plain provisions of Rule 56(*c*), governing summary judgments in the federal courts. That rule makes it the duty of the trial judge, when a motion for summary judgment is filed, to search the record for any genuine issue of fact that exists in the action; and if he finds none to enter judgment forthwith.

The rule is too well established to require argument or citation of authorities that a superior court cannot control the discretion of an inferior court having jurisdiction of the matter unless there exists a statute, or court decisions, requiring certain specified issues of fact sent to a jury; for example: the question of

treble damages in anti-trust suits. See *Beacon Theatres v. Westover*, 359 U.S. 500, 504.

There is no federal statute that requires the question of attorney fees to be sent to the jury. In the case of *U. S. v. Anglin and Stevenson*, 145 F. 2d 622, (10th) (1944), the Court allowed 25 percent of estate or $250,000 attorney's fees, plus reimbursement of expenses on recovery of $1,000,000 with five year's work and the court fixed the reasonable attorney's fee in the absence of a jury. The State of Oklahoma has no such statute. The only issue of facts which must be sent to a jury in Oklahoma are those provided for by Section 556 and 557, Title 12, Oklahoma Statutes Annotated 1951:

> "Section 556. Issues of law must be tried by the Court unless referred. Issues of fact arising in actions for the recovery of money, or of specific real or personal property, shall be tried by a jury, unless a jury trial is waived, or a reference be ordered as hereinafter provided.
>
> "Section 557. All other issues of fact shall be tried by the Court, subject to this power to order any issue or issues to be tried by a jury, or referred as provided in this code."

The present action is an action for a declaratory judgment in the Federal Court, based upon the Declaratory Judgment Statutes and the Rules of Civil Procedure. It seeks no money judgment, nor real or personal property, but seeks only to determine what fee, if any, Simler owes Conner for legal services rendered in the Federal court. He admits he owes him; he wants to know how much.

V. Court of Appeals Allowed Piecemeal Appeal

There is no material question of fact from all the evidence in this case to submit to a jury. The case, being a declaratory judgment action involving the interpretation of a written contract, did not require a jury.

The Court of Appeals erred in the first instance by allowing Simler to appeal this case in a piecemeal fashion. The presentation of the Motion for Summary Judgment covered several days and at the close of the first day it was evident that the Court was going to sustain Conner's motion for summary judgment, but the hearing was continued for further argument. Before the hearing was reconvened, Simler filed a Petition for Writ of Mandamus in the Court of Appeals, Tenth Circuit, on the ground that the trial court had denied plaintiff a jury trial. The Court of Appeals, treating the Petition as an application to file a Petition for Writ of Mandamus, entered the order. (App. C)

Other courts of appeals have held that the right to a jury trial is not denied simply because a motion for summary judgment is sustained. *Lindsey* v. *Leary*, C.C.A. Wash. 1945, 149 F. 2d 899, cert. den. 326 U.S. 783, *Securities and Exchange Commission* v. *Payne*, (D.C. N.Y. 1940) 35 F. Supp. 873 and *Matter of Peterson*, 253 U.S. 300, 310, is clearly in accord with this rule. In that case Justice Brandeis pronounced that, "No one is entitled in a civil case to trial by jury unless and except so far as there are issues of fact to be determined." Concisely that states the Constitutional justification for summary judgment.

The Tenth Circuit's opinion on its face denies Conner the right to move for a directed verdict or to seek any other procedural relief to which he may be entitled. It would require the court to overrule a Motion for Directed Verdict by Conner; because the opinion states unequivocally that a jury *must* determine this case. This is an abuse of power by the Court of Appeals and the opinion should be reversed and the judgment of the District Court should be reinstated. By permitting this piecemeal appeal, the Tenth Circuit has unwarrantedly attempted to control the trial judge's discretion before he had exercised it.

The grant or denial of a jury trial by a District Court is not an appealable order. *Morgantown* v. *Royal Insurance Co.*, 337 U.S. 254; *Miller* v. *Pyrites*, 71 F. 2d 804, cert. den. 79 L. ed. 696. Yet the Court of Appeals granted a mandamus order directing a jury trial of "disputed issues" in the case and now they construe it as directing the trial judge to grant a jury trial, whether he found "disputed issues" or not.

The District Judge found no issue. There was nothing to go to a jury. There is no right to a jury trial unless issues triable by a jury exist, but the Tenth Circuit conjured up a jury right, where no issues of fact existed, by mixing its unwarranted mandamus order with a misapplication of an Oklahoma rule on the burden of proof.

CONCLUSION

Summary judgment under the Federal Rules is intended to allow the proper law to be applied to undisputed facts without going into a useless trial. The trial court found the facts to be undisputed. The Court

of Appeals reversed *but it did not find any dispute.* It reversed because Oklahoma law put the burden to prove the absence of fraud on the attorney in this type of case. This is an unprecedented and extra-legal basis to reverse a summary judgment. It is in conflict with the test applied by other circuits. Moreover, the Tenth Circuit misconstrued the Oklahoma law; it misused its mandamus power and completely negated the District Judge's discretion in the area of granting or denying jury; as well as in the realm of summary judgment.

WHEREFORE, Petitioner prays that certiorari be granted and the judgment of the Court of Appeals reversed and the judgment of the trial court reinstated.

Respectfully submitted,

PEYTON FORD
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Attorney for Petitioner

Of Counsel:

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LESLIE L. CONNER
Oklahoma City, Oklahoma

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

A. J. SIMLER, *Plaintiff*,

v.

LESLIE L. CONNER, *Defendant*.

Order Sustaining Motion for Summary Judgment and Judgment

Now on this 12th day of January, 1960, plaintiff appearing by his attorney of record, John B. Ogden, and the defendant appearing by his attorney, Robert O. Bailey, and the Court having heard further from counsel on behalf of plaintiff in opposition to defendant's Motion for Summary Judgment, and having further considered said Motion and heretofore carefully reviewed and examined the depositions of plaintiff, defendant and others, the exhibits, transcripts, pre-trial admissions and the entire record in this cause, the Court finds and determines that there is no genuine issue of any material fact in this case and that the Motion of defendant for Summary Judgment should be sustained and judgment entered summarily for the defendant for the reasons:

That there is no issue of fact concerning the circumstances under which the letter of September 25, 1952 came into existence in which the parties themselves fixed the percentage of recovery to be realized by defendant as his contingent attorney fee provided in the letter of July 18, 1952, and there is no evidence of fraud, overreaching or misconduct on the part of the defendant which would

form any basis to set aside or disregard the letter as a part of the contract between the parties.

That under the terms of the letter of July 18, 1952, properly construed and interpreted, even if the parties had not thereafter agreed upon the percentages, the contingent fee was to be set by the Court without a jury and the Court finds from the undisputed facts as to the services rendered that a reasonable contingent fee for the services of the defendant in the cause is 50% of the real and personal property recovered after payment of the expense of the litigation.

That all the money and property which the plaintiff has received from the estate of his deceased sister came to him by reason of the legal services rendered by the defendant for the plaintiff upon the contingent fee contract composed of the aforesaid letters and in the contest of the will and other actions relating thereto, resulting in the Final Decree of the County Court of Oklahoma County in the estate of Birdine Fletcher, deceased, Cause 31726, decreeing plaintiff, A. J. Simler, to be the owner of a complete title to the Northwest Quarter (NW¼) of Section 34, Township 6 North, Range 10 West, Caddo County, Oklahoma with all interest and mineral rights therein and all oil and gas production therefrom; that defendant performed legal services for and was attorney for plaintiff in some 19 separate cases in the State Courts and Supreme Court of Oklahoma, the Federal Courts, the Court of Appeals and the Supreme Court of the United States; that defendant has fully performed his contract and plaintiff has accepted the benefit of defendant's services all with full knowledge that he was proceeding under said contingent fee contract composed of both of the aforesaid letters.

That this Court now has jurisdiction of the parties and subject matter and in construing and applying the contingent attorney fee contract should sustain the defendant's Motion for Summary Judgment for 50% of all money and

property recovered by defendant for plaintiff which includes 50% of all income therefrom less expenses as provided by said contract and that defendant Leslie L. Conner is entitled to summary judgment against plaintiff A. J. Simler as a matter of law.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by this Court that the Motion for Summary Judgment of defendant Leslie L. Conner against the plaintiff A. J. Simler allowing a contingent attorney's fee to defendant Leslie L. Conner of fifty per cent (50%) of all property, moneys and the income therefrom recovered should be and the same is hereby sustained.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Leslie L. Conner is the owner of an undivided one-half interest in the fee simple title to land, improvements, surface minerals, mineral rights, and oil and gas production of the Northwest Quarter ($NW\frac{1}{4}$) of Section 34, Township 6 North, Range 10 West in Caddo County, Oklahoma, and by this Order said undivided one-half interest in same is hereby conveyed to and vested in Leslie L. Conner.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that the contract between plaintiff A. J. Simler and defendant Leslie L. Conner provided that all expenses, taxes, and costs of the litigation should be deducted from the recovery before the division of recovery made between the parties and the Court finds that there is held in the registry of the Clerk of this Court the sum of Ninety Four Thousand Three Hundred Seventy Seven Dollars and One Cent ($94,377.01), which is part of the recovery made by the defendant Leslie L. Conner.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that each of the parties render to the other before the 27th day of January, 1969, an equitable accounting of the moneys received and the expenses, taxes and costs which each claim to have disbursed as contemplated by the above contracts, and

IT IS FURTHER ORDERED that each party shall be reimbursed to the extent he is entitled to be reimbursed and thereafter the balance of the funds in the registry of the Clerk and on hand shall be paid fifty per cent (50%) to defendant, Leslie L. Conner, and fifty per cent (50%) to plaintiff, A. J. Simler.

STEPHEN S. CHANDLER,
United States District Court.

FILED Jan. 12, 1960
VERA L. HOWARD,
Clerk, U. S. District Court.
By Giles K. Ratcliffe, Deputy.
ATTEST: A true copy of the original order.
VERA L. HOWARD, Clerk,
By Joseph P. Gore, Deputy.

APPENDIX B

Judgment

Forty-Ninth Day, May Term, Saturday,
September 3rd, 1960.

Before Honorable Sam G. Bratton, Honorable John C. Pickett, and Honorable David T. Lewis, Circuit Judges.

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Oklahoma and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said district court in this cause be and the same is hereby reversed, that this cause be and the same is hereby remanded to the said district court with instructions to grant a jury trial in conformity with the views expressed in the opinion of the court, and that A. J. Simler, appellant, have and recover

of and from Leslie L. Conner, appellee, his costs herein and have execution therefor.

A. J. SIMLER, *Appellant*,

v.

LESLIE L. CONNER, *Appellee*.

No. 6339.

United States Court of Appeals

Tenth Circuit

Sept. 3, 1960.

Rehearing Denied Sept. 27, 1960.

Before BRATTON, PICKETT and LEWIS, Circuit Judges.

PICKETT, Circuit Judge.

This is a declaratory judgment action in which the plaintiff Simler seeks a determination of his liability to the defendant Conner for legal services rendered in an Oklahoma Will contest matter. The pleadings raise the question of whether the liability is to be fixed upon the basis of the reasonableness for the services or by employment letters, one of which would entitle Conner to a one-half interest in property recovered by litigation. Simler's demand for a jury trial on the issue of a reasonable fee was denied by the trial judge. Thereupon Simler brought mandamus proceedings in this court in which he sought an order directing the District Court to submit the issue to a jury. On January 7, 1960, an order was entered directing the District Judge to vacate all orders theretofore entered denying the jury trial to the plaintiff and to submit for determination all disputed issues of fact arising in such action. Defendant's motion for summary judgment was pending and the

order provided that it was not to be construed to affect the right of the District Court to dispose of the action summarily. On January 12, 1960 the District Court entered an order sustaining defendant's motion for summary judgment and adjudged Conner to be the owner of a one-half interest in certain oil producing farm lands which had been distributed to Simler as a result of litigation in the federal courts. This appeal is from that judgment.

Simler's sister, Birdine Fletcher, died in July of 1952, leaving a Last Will and Testament in which she devised to Simler, her sole and only heir at law, the sum of "one dollar and no more." The residue of her estate, which included the oil producing farm lands, was bequeathed to a corporate charitable organization. On July 18, 1952, Simler employed Conner to represent him to contest the admission of the will to probate. The employment was confirmed by a letter of that date in which Simler, in addition to expenses, agreed to pay a reasonable attorney fee for the services in case there was a recovery.[1]

On July 30, 1952, Simler approved the proposed objections to the admission of the will to probate prepared by Conner and directed them to be filed as of that date. Following the will contest hearings, Conner employed additional attorneys to assist him.[2] The attorneys concluded that a federal court action should be instituted to determine the rights of the charitable devisee, a Missouri corporation, to inherit the Oklahoma real property. The filing of this action was authorized by Simler.

The record discloses that because of appeals in the unsuccessful will contest matters and the changed circumstances occasioned by the federal court action, Conner and his associates were not satisfied with the fee arrangement

[1] (Letter of July 18, 1952. See p. 4, supra.)

[2] Conner agreed to share his fee with the additional attorneys and that separate charges were not to be made to Simler.

provided for in the July 18th letter. Consequently Simler, who lived in Arkansas, was called to Conner's office in Oklahoma City, and the matter of fees was again discussed. On September 25, 1952 a second letter was executed by Simler fixing the fee on the basis of specific percentages of any recovery.[3] The attack upon the power of the charitable devisee to inherit Oklahoma real property was successful in this Court (Simler v. Wilson, 210 F.2d 99), and the farm lands were thereafter distributed to Simler, together with impounded income therefrom. Conner assigned 28% of his claim for attorney fees to James E. Grigsby for his services, and Simler settled with Grigsby, taking an assignment of his interest in the property.[4]

It is the contention of Simler that the September 25th letter was executed while the relationship of attorney and client existed between himself and Conner and was therefore unenforceable under Oklahoma law, and that Conner was entitled only to a reasonable fee for his services. Conner contends that the September 25th letter is not a new agreement but merely a determination of the parties as to what should be the reasonable fee provided for in the July 18th letter. We held in the mandamus action that Simler was entitled to a jury trial on the question of the reasonableness of a fee. This leaves for determination only the question of whether the September 25th letter is a valid contract for the payment of attorney fees.

The parties agree that ordinarily an attorney may, in good faith, contract for a percentage or portion of the proceeds of the client's cause of action or claim, not to exceed 50% of the net amount recovered. Title 5, § 7, O.S.A.; Williams v. Wright, 208 Okl. 613, 258 P.2d 162; Renegar v. Fleming, 202 Okl. 197, 211 P.2d 272; Emery v. Goff, 198

[3] (Letter of September 25, 1952. See p. 6, supra.)

[4] The ownership of the Grigsby interest was not determined by the District Court and cannot be disposed of here.

Okl. 534, 180 P.2d 175, 171 A.L.R. 457; Correll v. Holt et al., 191 Okl. 622, 132 P.2d 953; Board of Education of Oklahoma City v. Thurman, 121 Okl. 108, 247 P. 996; Lashley v. Moore, 112 Okl. 198, 240 P. 704.

The relationship of attorney and client is one of special trust and confidence. It requires that an attorney act toward his client with utmost good faith and fidelity. All dealings with the client must be fair, without fraud, duress or imposition. Board of Education of Oklahoma City v. Thurman, supra. The general rule is that contracts entered into between attorneys and clients while the relationship exists are not void as a matter of law. 5 Am. Jur., Attorneys at Law, § 160; 7 C.J.S., Attorney and Client, § 127; Spaulding, et al. v. Beidleman et al., 60 Okl. 183, 160 P. 1120; Annotation 19 A.L.R. 848. In Oklahoma such contracts are presumptively fraudulent and will not be upheld at the instance of the attorney unless a searching scrutiny shows them to be fair, just and equitable. Neary v. Markham, et al., 10 Cir., 155 F.2d 485.[5] When such contracts are called into question, the burden is upon the attorney to establish that they are fairly made, without fraud, duress or imposition. Roseboom v. Baughman, 169 Okl. 442, 37 P.2d 616; Haunstein v. McCalister, 172 Okl. 613, 46 P.2d 552. In Thomas v. Wilson, Okl., 185 P.2d 473, 475, in discussing business transactions between attorney and client, it was stated that the burden is upon the attorney to prove that such dealings are "on that ultra high plane of not only being without fraud, but also above

[5] Relying on Haunstein v. McCalister, 172 Okl. 613, 46 P. 2d 552, this Court, in Neary v. Markham, 155 F. 2d 485, 488, said:

"Contracts between attorneys and clients, while not absolutely void, are carefully scrutinized. While they are not void as a matter of law, they are presumptively fraudulent, and will not be upheld at the instance of the attorney unless a searching scrutiny shows them to be fair, just and equitable." (Footnote omitted.)

possibility thereof." Clearly the letter of September 25th, providing that the fees should be a fixed percentage of any recovery, was an adjustment of the original agreement providing for a different schedule, to the advantage of Conner, which made the foregoing rules applicable.

In the Haunstein case [172 Okl. 613, 46 P.2d 556], after stating that contracts between attorney and client to the advantage of the attorney, made while the relationship exists are presumptively fraudulent and that the burden of proof is upon the attorney to show that such contracts are fair, just and equitable, the court continued with the statement: "even then he is not entitled to recover more than reasonable compensation for his services, regardless of the contract price." Simler argues that this statement in effect nullifies the contract and limits the recovery in all such cases to a reasonable fee. If the language is to be construed as Simler contends it should, then all contracts between attorneys and clients made during the existence of the relationship would be ineffective regardless of the good faith and fair dealings of the attorney. It would be in conflict with the actual holding in Haunstein and the approved instruction to the jury on the issue of fraud in that case.

A fair analysis of the decisions of the Supreme Court of Oklahoma establishes that court recognizes and follows the general rule that a contract for compensation of an attorney, made during the existence of the relationship of attorney and client, is valid and enforceable if executed freely, voluntarily and with full understanding of the client. The voluminous record in this case indicates the vast amount of labor, skill and time spent by the attorneys in connection with different cases which reached the appellate courts of the State of Oklahoma and the federal judicial system. We do not intend to minimize the value of these services or to say that the contingent fees provided for in the September 25th letter are unreasonable, but we are convinced that under well established principles of law in

Oklahoma, the case should have been submitted to a jury on the question of whether the September 25th contract was fair, just and equitable and free from fraud.[6] If the jury finds that the contract was entered into fairly, with no overreaching on the part of Conner, then it may be enforced. On the other hand, if the jury finds that the September 25th part of the contract was consummated because of an unfair advantage taken by Conner, then it should determine the question of a reasonable fee, which is admittedly due.

Conner raises the question of estoppel, contending that Simler accepted the benefit of the last contract and now seeks to avoid liability thereunder. Simler admits that Conner is entitled to reasonable compensation for his services under the original employment or in quantum meruit. If the second contract is void, the provisions of the first contract would be effective and the fees should be fixed according to its terms. The doctrine of estoppel cannot be invoked to render a void contract valid. 19 Am. Jur., Estoppel § 4, 149; General Beverages, Inc. v. Rogers, 10 Cir., 216 F.2d 413, 417.

The case is reversed and remanded with instructions to grant a jury trial in conformity with the views herein expressed.

[6] The case was originally assigned to Judge Wallace for trial and most of the preliminary matters were disposed of by him. Prior to the transfer of the case to Chief Judge Chandler, a jury trial was ordered on this issue by Judge Wallace.

APPENDIX C

Order Denying Petition for Rehearing

TENTH DAY, SEPTEMBER TERM, TUESDAY, SEPTEMBER 27th, 1960

Before Honorable Sam G. Bratton, Honorable John C. Pickett and Honorable David T. Lewis, Circuit Judges.

This cause came on to be heard on the petition of appellee for a rehearing herein and was submitted to the court.

On consideration whereof, it is ordered by the court that the said petition be and the same is hereby denied.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 685

LESLIE L. CONNER, *Petitioner*,

v.

A. J. SIMLER, *Respondent*.

PETITION FOR REHEARING

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 685

LESLIE L. CONNER, *Petitioner*,

v.

A. J. SIMLER, *Respondent*.

PETITION FOR REHEARING

Petitioner prays that this Court grant rehearing of its order of March 20, 1961, denying the petition for writ of certiorari, and that a writ of certiorari issue to review the judgment of the Court of Appeals for the Tenth Circuit in the above-entitled case as prayed for in the petition filed herein.

REASONS FOR GRANTING REHEARING AND ISSUING THE WRIT

This Court denied certiorari in this case on March 20, 1961. Subsequently on March 28, 1961 the Supreme Court of Oklahoma decided *Southard* v. *MacDonald*,

. . . . Okla. . . . . , 32 Okla. Bar. Assoc. Jour. 609,[1] which is directly in conflict with the decision of the Tenth Circuit in this case.

The Supreme Court of Oklahoma in *Southard* v. *MacDonald*, held that "*Where it is necessary to cancel a contingent fee contract before any other relief prayed for can be granted, and the cancellation of such contract is the basic relief sought, neither party is entitled to a jury trial for the reason that the cancellation is a purely equitable matter.*"[2] It should be noted here that the Oklahoma court was applying an established principle of Oklahoma law to a situation it had not before considered, i.e., contingent fee contracts. This is evident from its discussion of several earlier Oklahoma decisions on which it based its holding. *Id.* at 611.

In reversing the summary judgment in this case in favor of petitioner, the Tenth Circuit clearly erred and its decision conflicts with the Oklahoma Supreme Court. This is evident from the language the Court of Appeals used:

> "We do not intend to minimize these services or to say that the contingent fees provided for in the September 25th letter are unreasonable, *but we are convinced that under well established principles of law in Oklahoma, the case should have been submitted to a jury* on the question of whether

[1] Ten copies of the issue containing the opinion are being filed with this petition.

[2] The quotation is the law of Oklahoma, as set forth in the syllabus of the case. Under 12 O.S.A. § 977, the Justice writing the opinion must set forth the points of law in a decided case in a syllabus. These are the law of the case and the opinion itself merely aids in the correct interpretation of the syllabi. *Corbin* v. *Wilkinson*, 175 Okla. 247, 52 P. 2d 45 (1936); *1942 Chevrolet* v. *State ex. rel. Cline*, 192 Okla. 555, 136 P. 2d 395 (1943).

> the September 25th contract was fair, just and equitable and free from fraud." (Emphasis added.) *Simler* v. *Conner*, 282 F. 2d 382, 386.

A comparison of the two cases establishes a direct conflict between a Court of Appeals and the highest court of a state. For this reason a writ of certiorari should be granted. *Huddleston* v. *Dwyer*, 322 U.S. 232; *Stoner* v. *New York Life Ins. Co.*, 311 U.S. 464. In the *Huddleston* case, this Court held that a Court of Appeals decision based on state law correctly applied at that time, *must* be reversed on review if in the meantime the state court announces a different rule of law. It is clear that under this principle this case must be reversed, or remanded to the Court of Appeals for reconsideration. *Huddleston* v. *Dwyer, supra.*

The facts of both this case and of *Southard* v. *MacDonald* are strikingly similar. In *Southard* two of six children engaged MacDonald, an attorney, to "break" the joint will of their deceased father and surviving mother. They feared that their mother would dispose of certain land instead of preserving it for them. MacDonald was to receive 40 percent of the two shares if successful, and a written contingent fee contract and a warranty deed to MacDonald were executed by the two children. MacDonald was successful in preventing the mother from disposing of the land. After her death, three of the children brought an action to partition the land and named MacDonald and the other three children as defendants. The two who hired MacDonald answered and also filed a cross-petition against MacDonald alleging that the contingent fee contract was "a nullity because procured by fraud and deceit, not properly acknowledged, not delivered," and that there was a "complete failure of consideration."

They sought to have the contingent fee contract and the deed set aside. The trial court denied a motion for a jury trial and gave judgment for MacDonald.

In the present case, respondent hired petitioner to "break" his sister's will that left him but $1.00. He first signed a contract for a "reasonable fee" and two months later, agreed in writing (September 25th letter—see Petition, p. 6) to pay petitioner "50%" of the amount recovered if the case is appealed to the Supreme Court." This agreement was merely explanatory of the original contingent "reasonable fee" provided in the July 18th contract. (Pet. p. 4) The September 25th letter opened:

> "With reference to my letter of July 18, 1952 employing your firm in the Fletcher Will and Estate Contest, I agree that the reasonable fee is:"

After five years of labor and nineteen different proceedings petitioner succeeded in obtaining a valuable oil tract for respondent. In addition, in a separate suit, he prevented the tract from bearing the administration expenses ($73,000.00). After the litigation was won, the respondent refused to honor his contract. He sued for a declaratory judgment to declare the contingent fee contract void, alleging it was procured by fraud, that there was no consideration, that it was a nullity, the very same things alleged about the *Southard* v. *MacDonald* contract. The trial court upheld the contract and ordered half of the land to be conveyed to petitioner.

To this point the two almost identical cases involving identical issues were resolved under identical law, although one was in a federal court and the other in a state court of Oklahoma.

It has been pointed out above that the Tenth Circuit in this case reversed the District Court because it believed, and so stated in its opinion (282 F. 2d at 386), that Oklahoma's law required a jury to decide whether the contract was "entered into fairly." If a jury found it was, "then it may be enforced." This is precisely the contention overruled by the Oklahoma Supreme Court in *Southard* v. *MacDonald*. It held:

> "Since it is clear that the prime and necessary purpose of plaintiff's action was based upon the cancellation of the contingent fee contract and deed, alleged to have been secured by fraud and deceit, *a purely equitable action, we find no merit in the contention that it was error to deny plaintiffs a jury trial.*" (Emphasis added)

The Tenth Circuit relied expressly on "well established principles of law in Oklahoma." Its reliance was erroneous and its decision must therefore fall. It is the Oklahoma law that there is no right to have a jury to decide the validity of a contingent fee contract. There being no issue of fact, the summary judgment of the United States District Court upholding the contract in this case must be reinstated. 28 U.S.C. Rule 56, F.R. Civ. P.

One of the cases relied upon by the Tenth Circuit in its decision was *Haunstein* v. *McCalister*, 172 Okla. 613, 46 P. 2d 552. It was cited as authority that "the burden is upon the attorney" to show that contracts made with clients after the relationship has begun are fairly made, without fraud, duress, or imposition. In *Southard* v. *MacDonald*, at p. 613, the Supreme Court of Oklahoma also commented on that case, but gave it a totally different emphasis:

> "In *Haunstein* v. *McCalister*, 172 Okla. 613, 46 P. 2d 552, *we approved a judgment wherein a fee was increased after the original contract of employment.* The evidence in the case at bar does not show overreaching on the part of the defendant." (Emphasis added.)

Thus, that case means that a fee may be increased after the original agreement; it will be upheld if there was no overreaching by the attorney; and the court, not the jury, decides the question of whether there was overreaching. A fortiori, in this case, in which the fee was not increased but merely defined, the trial court can, *and did*, find the agreement to be without fraud.

In this case, as in *Southard*, there could be no payment to the attorney except what was specified in the written contract unless that contract was cancelled by the court. That was the heart of the *Southard* suit. "Unless and until this contract was cancelled the court could not reach" any other issue. 32 O.B.A.J. at 611. Cancellation of the contract was "the prime and necessary purpose" of the suit. This fixed the nature of the suit as equitable and determined that neither party was entitled to a jury trial. Exactly the same facts exist in and control this case. Simler, the respondent, sued to have the court adjudge him to pay a "reasonable fee." Before the Court could do so it would have to cancel the existing contingent fee contract. It was "necessary to cancel a contingent fee contract before any other re-

lief" could be granted. In Oklahoma the law in this situation is now unmistakeable. "(N)either party is entitled to a jury trial for the reason that the cancellation is a purely equitable matter." *Southard* v. *MacDonald*, 32 O.B.A.J. at 699. A clear conflict has arisen between the Court of Appeals for the Tenth Circuit and the highest court of Oklahoma.

In *Phillips Petroleum Co.* v. *Cabot Carbon Co.*, 348 U.S. 867, this Court vacated a Tenth Circuit judgment which conflicted with a subsequent ruling of the Corporation Commission of Oklahoma and remanded the case to the Court of Appeals for reconsideration in the light of the Commission ruling. The same principle is applicable here. The Court of Appeals has declared that its decision rests solely on Oklahoma law. It is now evident that its concept of the Oklahoma law was erroneous. Its decision must be vacated and the original judgment reinstated, or the Court of Appeals must reconsider its decision in the light of *Southard* v. *MacDonald*.

CONCLUSION

This case is clearly within the language and intent of Rule 58 of this Court. It is respectfully submitted that a rehearing should be granted, that a Writ of Certiorari should issue, and that the decision of the Court of Appeals should be reversed, or the case remanded to the Court of Appeals for reconsideration in the light

of the decision of the Supreme Court of Oklahoma in *Southard* v. *MacDonald*.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the Rules of this Court.

PEYTON FORD
Attorney for Petitioner

FILE COPY

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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. 685

LESLIE L. CONNER,
Petitioner,

VERSUS

A. J. SMILER,
Respondent.

RESPONSE TO PETITION FOR REHEARING

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RESPONSE TO PETITION FOR REHEARING

Comes now the respondent herein, A. J. Simler, and in accordance with the direction of this Court to respond to the Petition for Rehearing filed herein by the petitioner, shows to this Honorable Court the following:

This involves a suit by the respondent, A. J. Simler, filed against the petitioner, Leslie L. Conner, in the United States District Court for the Western District of Oklahoma wherein Mr. Simler seeks a declaratory judgment asking the Court to determine what fee, if any, additional he owes to the said Conner as attorney fees. The petitioner alleged that he had paid to Mr. Conner the sum of $24,000.00 in cash, $12,800.00 to Mr. James Grigsby, an associate of Mr. Conner, $7,500.00 to John B. Ogden, an attorney who was employed by Mr. Simler to aid Mr. Conner, and that he paid a sum of $46,000.00 as attorney fees to

Fred Suits, Mary Weiss, Dudley, Dudley and Dudley, attorneys who were opposing him in the litigation, but said last sum he was ordered to pay by the County Court of Oklahoma County, Oklahoma, making a total he paid out in attorney fees of $90,300.00, and he alleged further that he asked the Court to adjudge whether or not he is indebted to the said Leslie L. Conner in any sum or sums whatsoever and if so to what extent or what amount. The defendant in that action, the petitioner herein, Leslie L. Conner, filed his answer to the complaint and amended complaint and in his answer he sets out that he was employed by Mr. Simler on July 18, 1952, which employment was evidenced by a letter which Mr. Conner wrote and asked Mr. Simler to sign, which letter is in words and figures as follows, to-wit:

"July 18, 1952

"Mr. Leslie L. Conner, Atty.,
"410-414 Hightower Bldg.,
"Oklahoma City, Oklahoma

"Dear Sir:

Re: Birdine Fletcher Estate
County Court Oklahoma County,
Oklahoma

"This confirms our employment of yourself and law firm to represent us in the matter of the Estate of Birdine Fletcher, deceased, now pending in the County Court of Oklahoma County, Oklahoma, wherein certain people have filed petition to probate an alleged will supposed to be signed by her.

"We agree to pay all the witness fees, court costs, furnish all bonds, purchase copy of all records from court

reporters, prepare the evidence and pay all necessary bills to contest the admission of this will to probate because we do not believe it is a valid will. We understand that this will run in the approximate neighborhood of $1,000.00.

"We also agree to pay you and your firm a reasonable attorney's fee for the services rendered and to be rendered in this case in the County Court, and if necessary, in the District Court and if necessary in the Supreme Court of the State of Oklahoma, which fee may be set by the County Court of any other court if the matter is successful either by trial or judgment or compromise.

"If the matter is not won, compromised or settled, you are not to charge us a fee.

"Yours truly,

"/s/ A. J. Simler
"A. J. Simler, for himself and his children"

At this time, that is July 18, 1952, the relationship of attorney and client was fixed by virtue of such letter and Mr. Leslie L. Conner became the attorney for Mr. A. J. Simler. This is important in this case because under Oklahoma law, after the relationship of attorney and client exists, no contract can thereafter be made between the attorney and client on account of the fiduciary relationship except for a reasonable fee for services rendered as will be pointed out hereinafter in this response. Mr. Conner then represented Mr. Simler and while such relationship existed and on September 25, 1952, without any consideration whatsoever, Mr. Conner prepared another letter in his office and called Mr. Simler to come to his office

and as the record shows, after much persuasion secured the signature of Mr. Simler on such second letter which second letter is in words and figures as follows, to-wit:

"September 25, 1952

"Mr. Leslie L. Conner
"Conner, Hilpirt & Britton
"Attorneys and Counselors at Law
"410-414 Hightower Building
"Oklahoma City, Oklahoma

"Dear Sir:

"With reference to my letter of July 18, 1952, employing your firm in the Fletcher Will and Estate Contest, I agree that the reasonable fee is:

25% of the amount recovered if settled without trial.

33% of the amount recovered if case is tried in County and District Court.

50% of the amount recovered if the case is appealed to the Supreme Court.

"I understand that all expenses, taxes and costs are to be deducted first.

"This is a contingent fee and if nothing is recovered, no fee is to be paid.

"If anything is recovered or settled, I agree to pay you the above fees.

"Yours truly,
"/s/ A. J. Simler"

This second letter was written completely with the typewriter except the figures "25" following September which was written with pen which we feel indicates the letter was prepared long before Mr. Simler was ever

called to Mr. Conner's office. This second letter was written entirely by Mr. Conner and Mr. Simler had no advice from anyone except Mr. Conner, his own lawyer, concerning the matter. Mr. Simler testified by deposition, which depositions are in this case and in the record, that the only reason he signed the letter of September 25 was because Mr. Conner continued to persuade him to so do; that he knew nothing about what a reasonable fee was and the only information or advice he received was that given to him by Mr. Conner while the relationship of attorney and client existed.

THE OPINION OF THE SUPREME COURT OF OKLAHOMA IN *SOUTHARD* v. *MacDONALD*, DECIDED MARCH 28, 1961, 32 OKLA. BAR ASSOCIATION JOURNAL 609, IS IN NO WISE IN CONFLICT WITH THE OPINION OF THE TENTH CIRCUIT IN THIS CASE.

In discussing this case and for convenience sake we will refer to the case of *Southard* v. *MacDonald* as the *Southard* case. In the *Southard* case the Supreme Court of Oklahoma merely announced the rule with reference to a suit to cancel a deed and in connection therewith we call to the Court's attention the fact that the first paragraph of the opinion by the Supreme Court of Oklahoma is as follows:

> "This was an action by Cynthia Ann Trammell, Robert Lee Southard and Flora Marshall against Frank Southard, Myrtle Carpenter, Bernice Little and D. S. MacDonald, Jr., to partition 420 acres of land. * * *
>
> "Plaintiffs alleged that when they employed MacDonald he assured them that he could break the will of their father, and asked them to sign a contingent

fee contract of 30 per cent of all properties recovered for them, if he broke the will, or nothing if he failed to break the will; that he also asked them to sign another instrument which they were led to believe authorized him to have a guardian appointed for their mother, but which was in fact a warranty deed conveying to him 40 per cent of the value of all property recovered for them."

It will be thus noted that this was a suit to cancel that deed and that the deed and attorney's contract were entered into at the same time and before the relationship of attorney and client existed between D. S. MacDonald, Jr., Frank Southard and his sister, Bernice Little. At that time there was no fiduciary relationship between the parties. They could contract in any way they saw fit. They prayed that the contingent fee contract between them and MacDonald be cancelled and that the Warranty Deed by them to MacDonald be cancelled. The Supreme Court in discussing the question of whether or not this type of action in the *Southard* case is a jury case followed the long established rule in Oklahoma that it is well settled that an action, the primary purpose of which is to set aside a deed conveying real estate and obtaining a decree reinvesting title in plaintiff, is one of equity and in such action neither party is entitled to a jury.

In the case at bar and for consideration here no such question is presented. The question presented here is "What is a reasonable attorney's fee" and Mr. Simler is not asking to cancel anything. He asks the Court in a declaratory action to declare what is a reasonable fee and whether or not he has paid a reasonable fee to his attorney Mr. Conner.

We call to the Court's attention the case from the Oklahoma Supreme Court which is mentioned in the *Southard* opinion, being *Hausstein* v. *McCalister*, 172 Okla. 613, 46 P.2d 552, in which the Supreme Court of Oklahoma used the following language:

"Syllabus by the court.

* * * * * * *

"2. Contracts between attorney and client, to the advantage of the attorney, made while such relation exists, are presumptively fraudulent, and the burden of proof is upon the attorney to show that such contracts are fair, just, and equitable, and even then he is not entitled to recover more than reasonable compensation for his services, regardless of the contract price. * * *"

We quote further from this same case as follows:

"The main issue involved in this case was whether a new contract of employment was made between the parties. Plaintiff claimed that he turned this money over to defendant to be used in paying all claims listed in the bankruptcy matter, and that the residue, if any, remaining after paying said claims was to have been returned to him. Defendant contended that a new contract of employment had been made between himself and the plaintiff by which the plaintiff was to place in his hand the sum of $3,500, and that out of this sum the defendant was to pay the Hubbard judgment, which amounted to $1,115, and the balance was to be retained by defendant as attorney's fee for closing the bankruptcy proceedings and for defending the threatened criminal prosecutions. The jury, by their verdict, decided the issue in favor of the defendant, as to the existence of the new contract, but

awarded the plaintiff judgment for the sum of $1,259.15 instead of the sum prayed for in his petition.

"This instruction as a whole embodies a fair statement of the law applicable to this case. It is as follows: 'You are instructed that as an affirmative defense herein, the defendant pleads and contends that the $3500.00 was paid to and received by him on November 5th, 1929, under a second and separate employment contract between the plaintiff and the defendant, whereby defendant alleges, it was agreed that the defendant was to first pay out of said money, the principal, interest and costs of said Ella Hubbard judgment and the costs of said bankruptcy proceedings, and that the remainder was to be retained and kept by the defendant as a fee and compensation for the defendant for services thereafter rendered by defendant and said Lee Gray in representing plaintiff in any action, civil or criminal, arising out of said bankruptcy proceedings, and that said sum was reasonable compensation therefor. If you find from the evidence that at the time said second, separate and new contract is alleged to have been made, that the relation of attorney and client existed between plaintiff and defendant, then, in that event, you are instructed that the relationship between attorney and client, after same is established is of the very highest trust and confidence, and that any contract then made for the benefit of an attorney is constructively fraudulent, and the burden is upon the attorney to prove the making of the contract by a preponderance of the evidence and also to prove and show that the contract is fair, just and equitable; and if you find that the defendant, Haunstein, has proved by a preponderance of the evidence that the second and new contract was made by and between plaintiff and defendant as alleged by defendant, and that defendant has also

proved by a preponderance of the evidence that said contract is fair, just and equitable, you will find for the defendant and award defendant reasonable compensation for services rendered after November 5th, 1929, in addition to the services covered by said $150.00 fee paid the defendant to represent plaintiff in said bankruptcy proceedings, as may be shown by the evidence in the case and award judgment for the plaintiff for such sum, if any, as you may find from the evidence to be the difference between the amount retained by defendant after paying said judgment and costs and the amount, if any, you may find from the evidence would be reasonable compensation for any services you may find from the evidence the defendant has rendered under said contract since November 5th, 1929, in addition to the services covered by said $150.00 fee paid the defendant to represent plaintiff in said bankruptcy proceedings. If you find that the defendant has failed to prove by a preponderance of the evidence that said new and second contract alleged to have been made on November 5th, 1929, was made and entered into between the parties, as alleged by defendant, your verdict will be for the plaintiff, and you will award judgment for a sum equivalent to the difference between said $3500.00 and said sums paid out by defendant in settlement of said Hubbard judgment and costs.'

"It is a well-established rule of law that contracts between attorney and client, to the advantage of the attorney, made while such relation exists, are presumptively faudulent, and the burden of proof is upon the attorney to show that such contracts are fair, just, and equitable, and even then he is not entitled to recover more than reasonable compensation for his services, regardless of the contract price."

It will thus be noted that under the law of Oklahoma that a contract made between an attorney and client, while that relationship exists, is presumtively fraudulent and the burden of proof is upon the attorney to show that such contract is fair, just and equitable and even then he is not entitled to recover more than reasonable compensation for his services *regardless of the contract price.* Consequently, this suit is merely a suit between Mr. Simler as plaintiff in the United States Court asking for declaratory judgment to determine what is a reasonable lawyer's fee, which must be decided under our law by a jury. Actually the question that was presented to the Court of Appeals in this case was an appeal from the District Court to the Court of Appeals wherein the District Court sustained a motion for a summary judgment and the question was whether or not the District Court could sustain such motion under the circumstances.

We wish to call to the Court's attention further the fact that there was no consideration whatever for the second letter which was prepared as heretofore stated by Mr. Conner. Mr. Conner was already employed under the letter of July 18, 1952, to represent Mr. Simler. Consequently, the second letter of September 25 did not require Mr. Conner to do anything more as he was already bound to represent Mr. Simler and therefore there was no consideration whatever for such second letter. This second letter furthermore is a complete nullity and is presumed to be fraudulent under the authority of the *Haunstein* case cited above. It is difficult to understand how Mr. Conner could ask for anything more than a reasonable fee and the letter of July 18, 1952, sets this out in part as follows:

"We also agreed to pay you and your firm a reasonable attorney's fee for the services rendered and to be rendered * * *."

Next, we point out particularly to this Court the authority dealing with the sustaining of a motion for summary judgment and presented under the folllowing heading: "Court was without authority to sustain motion for summary judgment."

The Supreme Court of Oklahoma in the case of *Wolfe v. Campbell*, 107 Okla. 112, 230 Pac. 506, said:

"ISSUE AS TO WHAT IS REASONABLE ATTORNEY'S FEE FOR JURY. In such action the issue as to what would be a reasonable attorney fee for services rendered is an issue of fact to be determined by a jury from the evidence. The court further said in an action for specified attorney fee where issue is joined as to what is a reasonable fee, such issue is for the jury, notwithstanding the plaintiff may pray that an equitable lien be decreed against defendant's land. In such case, the jury may properly determine the issue of fact and return a verdict for what it finds to be a reasonable fee, the court may then render judgment for the amount of the verdict, and, in the exercise of its equity powers, decree a lien against the defendant's land for the satisfaction of the judgment. The fact that decreeing a lien calls for the exercise of equity powers by the court does not take from the jury the power to first determine the issue of fact as to what fee is reasonable, a determination of the fee being the foundation of the right to a lien."

We quote from the body of the opinion:

"This was a suit for the recovery of a money judgment, $2,000.00 attorney's fee. Under Section 532, C.L.

1921, the amount in controversy being an issue of fact arising in an action for the recovery of money, defendants in error were entitled as a matter of right to a jury verdict. Said Section 532, together with Section 533, id., being the sections of our Code which provide what issues may be tried to a court and what issues as a matter of right must be tried to a jury, unless waived, read as follows:

"Section 532. 'Issues of law must be tried by the court unless referred. Issues of fact arising in actions for the recovery of money, or of specific real or personal property, shall be tried by a jury, unless a jury trial is waived, or a reference be ordered, as hereinafter provided.'

"Section 533. 'All other issues of fact shall be tried by the court, subject to its power to order any issue or issues to be tried by jury or referred as provided in this Code.'

"Hence the action being for the recovery of money, and the issue as to what amount, if any, should be recovered, being an issue of fact arising out of an action for the recovery of money, it was properly an issue to be determined by the jury, and the testimony as to the value of services being in conflict, plaintiff's attorneys testifying what they were worth, and defendants' attorneys testifying that they were worth less, the jury being judge of the credibility of the witnesses and weight of the testimony, its verdict will not be disturbed, if reasonably supported by the evidence, following the rule in Snyder v. Stribling, 18 Okl. 168, 89 P. 222, and Wallingford v. Alcorn, 75 Okl. 295, 183 P. 726."

In the case of *Opperud* v. *Tweedell*, 175 Okla. 191, 51 P.2d 799, the Supreme Court of Oklahoma speaking on the subject said in the body of the opinion:

> "A comprehensive examination of the evidence introduced in behalf of the plaintiff shows it to be sufficient, if accepted as true, to warrant a conclusion that the plaintiff was employed by the defendant to transact the business of others as well as her own and that the plaintiff had not been paid in full for the services thus rendered, That is, it was sufficient to present a disputed question of fact which should have been submitted to the jury. Whether the jury would accept the evidence and resolve the disputed question in favor of the plaintiff is, of course, an entirely different question."

We call the Court's attention to the following cases:

Bonelli v. *Conrad*, 37 P.2d 137 (Calif.);

Stuart v. *Preston*, 38 P.2d 155 (Calif.);

Humphreys v. *Commerce Trust Co.*, 133 Kan. 498, 1 P.2d 263;

Pierce v. *Rilovick*, 29 P.2d 228 (Calif.).

All of which held that the question of what is reasonable compensation is for the jury and in the case of *McManus* v. *Allan*, 89 P.2d 690, the Court held that in an action for reasonable value of attorney's services whether attorneys were to be paid for the reasonable value of services or upon a contingent basis was a question for the jury. In *Liebenguth* v. *Priester*, 148 P.2d 893 (Calif.), the Court held that it was proper for the jury to fix the amount as a reasonable fee for the attorney. And in the case of *Skeen* v. *Peterson*, 196 P.2d 708, Utah Court speaking, the

Court held that in an action by an attorney for fees, where the client counter-claimed an alleged over-payment that the issue on the defendant's counter-claim was for the jury. It would therefore appear to us that there can be no question but when the issue of attorney fee is involved that under the law of Oklahoma, it is to be determined like any other controversy where there is a question of fact involved. In the case of *C. E. Walker* v. *Edwin A. Ellinghausen*, 309 P.2d 1058, the Court passed upon a question of attorney suing for fees and held that the jury was properly instructed. Although there is no issue raised as to whether it was proper to submit it to the jury but there is complaint as to the form of the instructions. In the case of *McManus* v. *Alan*, 89 P.2d 690 (Calif.), the Court of Appeals said:

> "Syllabus Two (2), by the Editorial Staff. In Action for reasonable value of attorneys' services, whether attorneys were to be paid for the reasonable value of services or upon a contingent basis was for the jury."

We now call to the Court's attention the Oklahoma Statutes. Title 12, Article 552 of said title defines issues as follows:

> "Issues arise on the pleadings, where a fact or conclusion of law is maintained by one party and controverted by the other. There are two kinds. First, of law; Second of fact."

Article 554 of said Title defines an issue of fact as follows:

> "An issue of fact arises: First, upon a material allegation in the petition, controverted by the answer; or,

second, upon new matter in the answer, controverted by the reply; or, third, upon new matter in the reply, which shall be controverted by the defendant without further pleading."

Article 556 of said Title 12 is as follows:

"Issues of law must be tried by the court, unless referred. Issues of fact arising in actions for the recovery of money, or of specific real or personal property, shall be tried by a jury, unless a jury trial is waived, or a reference be ordered, as hereinafter provided."

Cited under said section and footnote 48 were both of the cases heretofore cited in the brief and in all of them the Supreme Court of Oklahoma held that in a suit for attorneys' fees, a jury trial was proper and the parties are entitled to it as a matter of law. Rule 38 of the Federal Rules of Civil Procedure provides for a jury trial of right and provides in part that the right of trial by jury as declared by the 7th Amendment of the Constitution of the United States or as governed by a statute of the United States shall be preserved to the parties inviolate. We wish to call to the Court's attention that the petitioner herein demanded a jury trial at the time he filed his complaint. He demanded a jury trial at the time he filed his reply to answer and cross-complaint. He demanded a jury trial at the time he filed his response to motion for summary judgment.

"The fact that this suit is one brought for declaratory judgment does not in any wise deprive the appellant of a jury trial. This court has so held and so have all courts where the matter has been presented."

See *City of Morgantown, W. Va. v. Royal Insurance Company*, 337 U.S. 254, 69 Supreme Court 1067, 93 Law Edition 1347.

In *Canister Company, et al. v. Leahy, Chief Judge*, 182 F.2d page 510, the United States Court of Appeals, Third Circuit, said:

> "The form of a complaint and the nature of the relief prayed for in it must guide a trial court in its determination as to whether or not a trial shall be to the court or by a jury."

In *Bereslavsky v. Caffey, United States District Judge, Second Circuit*, 161 F.2d 499, the Court said:

> Syl. 3: "In action for patent infringement the plaintiff is entitled to a jury trial where the sole claim is for money and demand for jury is timely."

With reference to a jury trial, we call to the Court's attention, Corpus Juris Secundum 50, page 778, beginning at the top of the inside column. This language is used:

> "Where an attorney's fee is taxable as a part of the costs, the amount of the fee may be determined by the court without a jury. Where there is a dispute over the terms of an agreement as to the fee to be paid, and also where it is provided by statute that in an action for damages plaintiff if successful may recover a reasonable attorney's fee, the amount of such fee must be determined by a jury, and the attorney does not lose the right to a jury trial because he is an officer of the court."

See the following authorities in support of the above:

—*Merritt v. Guthbert Bank*, 143 Ga. 394, 85 S.E. 104;

Cassel v. *Gregoria*, 28 Cal. App.2d Supp. 769, 70 P.2d 721;

Briggs v. *St. Louis & San Francisco Railway Company*, 111 Mo. 168, 20 S.W. 32;

In re: Kennedy, 120 Pa. 497, 14 Atl. 397;

In re: Pearlstein, 120 N.Y.S.2d 63.

Quoting from C.J.S., page 731, Volume 50, under paragraph "Particular Actions":

"The parties have been held entitled to a jury trial of the questions of fact in a great variety of civil actions at law, including actions of assumpsit; actions to recover damages for breach of contract or for fraud or patent infringement or for triple damages, under the Sherman Anti-Trust Law. Also, the guaranty has been held applicable to actions for dower, attorney's fees, commissions, contribution from a joint tort-feasor, goods sold and delivered, * * *

"See Neal v. Drainage Dist. No. 2 of Ada County, 248 P. 22, 42 Idaho 624; In re: Britton's Will, 60 N.Y.S. 2d 466; Western States Oil & Land Co. v. Helms, 288 P. 964, 143 Okl. 206, 72 A.L.R. 357; and Fisher v. Modern Woodmen of America, App., 59 S.W.2d 476; DePass v. Reed Interstate Transfer Assn., 59 S.E. 2d 495, 217 S. Carolina 38."

We wish to call to the Court's attention the case of *Sarton* v. *Arkansas Natural Gas Corporation*, 321 U.S. 620, 64 Sup. Ct. 724, 88 L. Ed. 967. The Supreme Court in setting out the requirements for summary judgment said, and we quote:

"Syllabus 7: The credibility of witnesses and weight to be given their testimony is for jury which may

exercise its independent judgment even if such testimony is uncontradicted.

"Syllabus 8: That a witness who is interested in the result of the suit is sufficient to require the credibility of his testimony to be submitted to the jury as a question of fact."

We quote further in the body of the opinion:

"There are many things sometimes in the conduct of a witness upon the stand and sometimes in the mode in which his answers are drawn from him through the questioning of counsel, by which the jury are to be guided in determining the weight and credibility of his testimony. That part of every case such as the one at bar belongs to the jury who are presumed to be fitted for it by their natural intelligence and their practical knowledge of men and the ways of men; and so long as we have jury trials they should not be disturbed in their possession of it except in a case of manifest and extreme abuse of their function. * * * We think the defendant failed to show that it is entitled to judgment as a matter of law. In the stipulation, the bulletin, the affidavit of the plaintiff's attorney and the admission of its witnesses, there is some, although far from conclusive, evidence of a market price or a value, under the rules laid down by the Court of Appeals, that support plaintiffs' case. It may well be that the weight of the evidence would be found on a trial to be with defendant. But it may not withdraw these witnesses from cross-examination, the best method yet devised for testing trustworthiness of testimony. And their credibility and the weight to be given to their opinions is to be determined after trial, in the regular manner. The judgment accordingly is reversed."

Toebelman, et al. v. *Missouri Kansas Pipe Lines, et al.*, Circuit Court of Appeals, Third Circuit, in discussing summary judgment:

"Syllabus 2: Upon a motion for summary judgment, it is no part of the court's function to decide issues of fact, but solely to determine whether there is an issue of fact to be tried.

"Syllabus 3: All doubts as to the existence of a genuine issue as to a material fact must be resolved against the party moving for a summary judgment."

This announcement by this Court in the body of the opinion said:

"* * * a substantial dispute as to a matter of fact, forecloses summary judgment and restates the opinions announced in the syllabus."

Mr. Simler testified on page 66 of his deposition:

Q. "Upon whose advice did you rely in signing that letter?

A. Well, I had no advice as far as that was concerned excepting that I seemed to take it for granted if Conner drew it up and wanted me to sign it, it was the proper thing to do.

Q. Well, did he advise you to sign it, ask you to sign it?

A. Well, naturally, or I wouldn't have signed it."

Page 65:

Q. "And I said when you signed that letter, did you have an opportunity to talk to anybody except

Conner about it, anybody else, an independent person?

A. No.

Q. All right, are you willing to pay a reasonable fee?

A. Yes sir, I always have been.

Q. And if you have not paid him already you are willing to pay him a reasonable fee?

A. Absolutely."

Without quoting verbatim from Mr. Simler's testimony to summarize it, he had an eighth grade education. He will be eighty-two years old in August of this year and consequently he was seventy-four years old at the time he signed the letter of employment. Quoting from his deposition further (page 9):

Q. "Now you agreed to pay him then a reasonable fee it says here, as I have read for contesting the will. Will you tell the court and jury at this time if you or he mentioned in any way at any time a suit in the Federal Court for the purpose of trying the title or the ability of the Sisters of St. Francis or any of the beneficiaries to take or hold the farm in Caddo County? Was that talked at that time?

A. There was no thought of that whatsoever.

Q. Was it ever even mentioned?

A. Never mentioned.

Q. So this letter was just to contest the will, is that right?

A. That is it."

Quoting further on page 10:

A. "The letter speaks for itself so far as that is concerned, but I will say in addition to that what I hired him for was to break the will.

Q. All right sir. Now, then, was anything else discussed in any way except the breaking of the will?

A. At that time, no.

Q. All right, sir. Now, then, Mr. Simler, would you tell the court and jury whether or not you relied upon the terms of this letter at the time you employed him on July 18, 1952?

A. There was nothing else to rely on that I know of.

Q. All right, sir. Then did you rely on the letter?

A. I relied on the letter.

Q. And employed him upon that basis only?

A. Employed him and his firm."

Quoting further (page 14):

Q. "Mr. Simler, would you tell the court and jury what, if anything, has been your experience or knowledge in connection with lawyer fees or fixing of lawyer fees? What has been your experience with that prior to this time before you got in this litigation?

A. Why, I haven't had any.

Q. All right, sir. Then, did you know when you employed Mr. Conner what was a reasonable fee or wasn't a reasonable fee? You put in there a reasonable fee to be fixed by the court?

A. No, but I trusted in the clause in there that we would, if we couldn't agree on a reasonable fee, it should be left up to the county court.

Q. The court.

A. Or any other court.

Q. All right, sir.

A. So I figured that that way I would be—have a certain amount of protection."

The *Haunstein* opinion, heretofore mentioned and referred to, holds that a letter or a contract secured after the relationship of attorney and client is established is presumptively fraudulent. Under Moore's Practice, Volume 5, page 177, construing Rule 38:

"Where on the other hand the liability has matured and the insurer either brings an action to cancel and the beneficiary counter-claims for recovery on the policy or the beneficiary sues and the insurer defended counter claims for cancellation the basic issue of fraud is triable to a jury."

Ettelson v. *Metropolitan Life Insurance Co.*, 137 F.2d 62; *Garman* v. *Metropolitan Life Insurance Co.*, 175 F.2d 12, on page 178, the same authority and we quote:

"And these principles are equally applicable to an action by the insurer framed along declaratory judgment lines instead of along the formal equitable line of action for cancellation."

Title 15, Oklahoma Statutes Annotated, Article 59. Constructive Fraud Defined. Constructive Fraud consists of:

"1. In any breach of duty which, without an actually fraudulent intent, gains an advantage to the person in fault, or any one claiming under him, by misleading another to his prejudice, or to the prejudice of any one claiming under him; or

"2. In any such act or omission as the law specially declares to be fraudulent, without respect to actual fraud."

The Supreme Court of Oklahoma said in substance as follows:

"Actual fraud is a question of fact. Actual fraud is always a question of fact.

"Article 61—

"1. In the use, by one in whom a confidence is reposed by another, or who holds a real or apparent authority over him, of such confidence or authority for the purpose of obtaining an unfair advantage over him.

"2. In taking an unfair advantage of another's weakness of mind;

"3. In taking a grossly oppressive and unfair advantage of another's necessities or distress."

In *Peckham* v. *Ronrico Corp.*, 171 F.2d 653, First Circuit:

"In suit based on alleged fraud of insolvent debtor in furnishing capital for corporation of which defendants were stockholders, where there was a conflict between first set of affidavits furnished by defendants and their second set and defendants' affidavits were contradicted by the plaintiff's final affidavit, defendants were not entitled to summary judgment."

The judgment was reversed.

In *Doehler Metal Furniture Co.* v. *United States*, 149 F.2d 130, Syllabus 5:

"Trial judges should exercise great care in granting motions for summary judgment. A litigant has a right to a trial where there is the slightest doubt as to the facts and a denial of that right is reviewable."

The Court said in the body of the opinion:

"Trial judges should exercise great care in granting motions for summary judgment. A litigant has a right to a trial where there is the slightest doubt as to the facts and a denial of that right is reviewable. Such a judgment wisely used, is a praiseworthy time-saving device. But although prompt dispatch of judicial business is a virtue, it is neither the sole nor the primary purpose for which courts have been established. Denial of a trial on disputed facts is worse than delay."

Arenas v. *United States,* 88 L. Ed. 1633, quoting further:

"The district courts would do well to note that time has often been lost by reversals of summary judgments improperly entered."

—*Sartor* v. *Arkansas Natural Gas Corp.*, 88 L. Ed. 967.

In *Whittaker* v. *Coleman,* 115 F.2d, pages 305, 306, 307, the Court said:

"To proceed to summary judgment it is not sufficient then that the judge may not credit testimony proffered on a tendered issue. It must appear that there is no circumstantial evidence on it that is either that the tendered evidence is by its nature too incredible to be accepted by reasonable minds or that considering its truth it is without legal probative force. Testing appellant's offer of proof by the rule it plainly appears that an issue on which he is en-

titled to a jury trial has been summarily decmed against him."

We call to the Court's attention the fact that on January 7, 1960, the United States Court of Appeals, Tenth Circuit, in Case No. 6300 styled *A. J. Simler, Petitioner* v. *Honorable Stephen S. Chandler, United States District Judge for the Western District of Oklahoma, Respondent,* on Petition for Writ of Mandamus, issued its order to the said District Judge to vacate all orders theretofore entered by the said United States District Court denying a jury trial to plaintiff in said cause and submit to a jury for determination all disputed issues of fact arising in such action. This order however contained a provision that it should not be construed as to affecting the right of the District Court to dispose of the action summarily if the court, in the exercise of its sound judicial judgment, determines such disposition to be required or proper in law. Thereafter the United States District Court did sustain a motion for a summary judgment in said cause and that is the appeal that was lodged in the United States Court of Appeals for the Tenth Circuit and that is the case that is pending here on Petition for Rehearing and the question thus presented to the United States Court of Appeals, Tenth Circuit, was whether a summary judgment should have been granted.

We call the Court's attention to the case of *Operators Royalty & Producing Co.* v. *Greene,* 173 Okla. 388, 49 P.2d 499, in which the Court said:

"The evidence being sufficient to carry to the jury the issue of fact as to the existence or non-existence of fraud, the verdict of the jury upon such issue of

fact will not be disturbed by this court, if the issue was submitted to the jury under proper instructions.

" 'When fraud is properly alleged upon the one hand and denied upon the other, the existence or nonexistence of such fraud becomes a question of fact for the jury to determine under proper instructions, and upon appeal the verdict of the jury upon such facts will not be disturbed by this court, if there is any evidence reasonably tending to support such verdict.' Illinois Oil Co. v. Pender, 137 Okl. 82, 277 P. 1026, Hall v. Smith, 126 Okl. 206, 259 P. 537."

In *Hope Natural Gas Co.* v. *Ideal Gasoline Co.*, 114 Okla. 30, 243 Pac. 206, Syllabus 2 by the Court is as follows:

"Appeal and error—1002—Fraud—64 (1)—Existence of fraud question for jury; verdict on conflicting evidence will not be disturbed. When fraud is properly alleged upon the one hand and denied upon the other, the existence or nonexistence of such fraud becomes a question of fact for the jury to determine under proper instructions, and, upon appeal, the verdict of such jury upon such facts will not be disturbed by this court, if there is any evidence reasonably tending to support such findings."

In *Illinois Oil Co. v. Pender, et al.*, 137 Okla. 82, 277 Pac. 1026, Syllabus 1 by the Court is as follows:

"Appeal and error—1001 (1)—Fraud, 64 (1)—Fraud is question of fact for jury; jury's finding on question of fraud will not be disturbed on appeal is supported by evidence.

"When fraud is properly alleged upon the one hand and denied upon the other, the existence or nonexistence of such fraud becomes a question of fact

for the jury to determine under proper instructions, and upon appeal the verdict of the jury upon such facts will not be disturbed by this court, if there is any evidence reasonably tending to support such verdict."

In the last cited case the officers served as officers in two corporations transacting business with each other and the court instructed the jury that a contract between two corporations effected by votes of directors common to both is presumptively invalid and can only be sustained by an affirmative showing of fairness and good faith.

The Court will note in the *Haunstein* case heretofore cited, that when an attorney deals with his client or contracts with him after the relationship of attorney and client has once been established, is presumptively fraudulent.

In the case of *Hall* v. *Smith*, 126 Okla. 206, 259 Pac. 537, the Supreme Court of Oklahoma said as follows:

"The defendant Murphy, while denying that he represented to the plaintiff that he was bookkeeper for the defendant Hall and had charge of the runs from these wells, denied that he made the representations that said wells were producing four or five barrels per day per well, but admits making the statement and representation that plaintiff could rely implicitly upon what Hall said to him and what Hall told him.

"Under this evidence an issue was created for the jury to pass upon. The jury by its verdict having found against the defendant Murphy, and there being sufficient evidence reasonably tending to support such verdict, this court is bound thereby."

CONCLUSION

The *Southard* case cited in the Petition for Rehearing as we view it, has no application whatsoever to the case at bar.

First: It was a suit to cancel a deed and contract. This is not a suit to cancel a deed and contract but is a suit brought for declaratory judgment to determine whether or not Mr. Simler owes Mr. Conner any additional amount as attorney fees.

Second: This case involves the sustaining of a motion for a summary judgment by the United States District Court for the Western District of the State of Oklahoma.

Third: The plaintiff in the United States District Court case alleged that Mr. Conner practiced actual fraud upon him and also constructive fraud. Mr. Conner denied the allegation which makes a question of fact to be determined by a jury.

Fourth: In the *Southard* case the Supreme Court of Oklahoma cited with approval the *Haunstein* case and the *Haunstein* case has never been overruled or modified by the Supreme Court of the State of Oklahoma. Since the *Haunstein* case is the law in Oklahoma, the letter dated September 25, 1952, is presumptively fraudulent and Mr. Simler testified by deposition and alleged in his complaint and reply to the facts concerning the execution of such second letter. There was absolutely no consideration of any kind for the second letter. If it is fraudulent, either presumptive or actual, it is

void and can confer no rights. This can only be determined by a trial of the case on its merits.

Fifth: The first letter dated July 18, 1952, employing Mr. Conner and agreeing to pay him a reasonable fee is within itself complete and full and a reasonable fee is all Mr. Conner should wish or ask for.

Sixth: The factual situation in the *Southard* case relied on by the petitioner herein is neither identical nor compatible with the factual situation in the *Haunstein* case nor is it the same or similar to the facts in the case at bar, for which reason the rule laid down in the *Southard* case has no application here.

We therefore most respectfully submit to this Honorable Court that the Petition for Rehearing should be denied and the cause tried to a jury as provided by the Constitution of the United States, the Rules of Civil Procedure and the Laws of the State of Oklahoma.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 685

LESLIE L. CONNER, *Petitioner*,

v.

A. J. SIMLER, *Respondent*.

REPLY TO RESPONSE

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A. J. SIMLER, *Respondent*.

REPLY TO RESPONSE

Respondent's lengthy Response to the Petition for Rehearing attempts to argue that the previous Circuit Court decision (*Simler* v. *Conner*, 282 F. 2d 382) in this case does not conflict with the decision rendered by the Supreme Court of Oklahoma in *Southard* v. *MacDonald*, ... Okla. ...., 360 P. 2d 940.

There is an obvious conflict. The elements of that conflict are as follows:

1. Respondent originally sued to obtain a determination of what fee he was required to pay, other than that indicated in the written contract.

2. No matter what respondent urges, no judgment could come down ordering him to pay a fee other than provided in the contract without cancelling that contract as a prerequisite to relief.

3. The United States Court of Appeals for the Tenth Circuit, in reversing the District Court, held that a jury must decide whether the written contract is valid and enforceable or should be cancelled.

4. The Supreme Court of Oklahoma held thereafter in the *Southard* case that neither party is entitled to a jury trial in a case in which the prerequisite to any other relief is the cancellation of a contingent fee contract.

Petitioner has no doubt that the Circuit Judges of the Court of Appeals for the Tenth Circuit would agree that the *Southard* case is unquestionably in conflict with their own decision in this case.

The Tenth Circuit said:

> ". . . we are convinced that under well established principles of law in Oklahoma, the case should have been submitted to a jury on the question of *whether the September 25th contract was fair, just and equitable and free from fraud.*" 282 F. 2d at 386. (Emphasis added.)

The Court continued, and this language shows that this case is exactly the kind contemplated by the *Southard* case:

> "If the *jury* finds the *contract* was entered into fairly, with no overreaching on the part of Conner, *then* it may be enforced. On the other hand, *if* the *jury* finds that the *September 25th part of the con-*

> *tract* was consummated because of an unfair advantage taken by Conner, *then it should determine the question of a reasonable fee.*" 282 F. 2d at 386 (Emphasis Added).[1]

"There can be no question that the disposition directed by the language quoted above, which was stated as being required "under well established principles of law in Oklahoma," conflicts with the following rule enunciated by the Supreme Court of Oklahoma in *Southard* v. *MacDonald:*

> "Where it is necessary to cancel a contingent fee contract *before any other relief prayed for can be granted*, and the cancellation of such contract is the basic relief sought, neither party is entitled to a jury trial, for the reason that the cancellation is a purely equitable matter." (Emphasis added.)

Petitioner respectfully renews its prayer contained in the Conclusion as set forth on pages 7 and 8 in its Petition for Rehearing.

Respectfully submitted,

PEYTON FORD
Attorney for Petitioner

[1] The respondent seeks to set aside the contract in its entirety. The validity of the July 18th part of the contract has never been challenged by the respondent. The "September 25th part of the contract" is no more than an agreed amendment of the earlier contract. (See pages 4 and 6 of the Petition for Certiorari where the two letters are set out in full.)